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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 887, 888

BOTANY WORSTED MILLS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below (R. 19b–32b, 55b), are not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 18–35) are reported in 41 N. L. R. B. 218. The decisions of the Board in a prior representation proceeding which forms a part of the record in this case (R. 9–17) are reported in 27 N. L. R. B. 687 and 28 N. L. R. B. 538.

JURISDICTION

The decree of the circuit court of appeals was entered on February 1, 1943 (R. 33b–35b). The

petition for writs of certiorari was filed on April 5, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the standards set up in Section 9 (b) of the Act for the Board's determination of the unit appropriate for the purposes of collective bargaining are so indefinite as to constitute an unconstitutional delegation of legislative powers.

2. Whether, in the circumstances of this case, the Board's determination of the unit appropriate for the purposes of collective bargaining constituted a proper exercise of the Board's discretion.

3. Whether there was substantial evidence to support the Board's finding that a specified union was, on December 18, 1940, and at all times thereafter, the exclusive representative, for the purposes of collective bargaining, of the employees in an appropriate unit.

4. Whether petitioner was denied due process of law in the proceedings before the Board by reason of the fact that the Trial Examiner who presided at the hearing in the proceeding for investigation and certification of bargaining

representatives had acted as attorney for the Board in the investigation prior to the hearing.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 17–18.

STATEMENT

On March 8, 1940, Textile Workers Union of America, affiliated with the C. I. O., herein called the Union, filed with the Board a petition for investigation and certification of representatives under Section 9 of the Act (R. 9). After appropriate proceedings the Board issued its Decision and Direction of Election, containing its findings of fact and conclusions of law (R. 9–14).

With respect to the bargaining unit, the Union contended before the Board that petitioner's wool sorters and trappers, including overlookers, constituted an appropriate unit, whereas petitioner contended that its sorters and trappers could not be set apart from the rest of the employees (R. 12). The Board found that the sorters and trappers were in a separate department (R. 12; R. 50–52, 57, 68);[1] that they had been organized by the Union (R. 12; R. 11, 55, 58); and that there was no evidence that any of the other employees

[1] In those portions of the Statement which describe the findings of the Board, references preceding the semicolon are to the Board's findings and succeeding references are to the supporting evidence.

desired to be represented by any union (R. 12; R. 23a). It concluded that although under other circumstances the small unit sought might not be the most effective possible, nevertheless, in order to effectuate the purposes of the Act, it was "obviously desirable" to "render collective bargaining * * * an immediate possibility." It therefore found that the unit urged by the Union was appropriate (R. 12–13), and accordingly directed the holding of an election to ascertain whether or not the employees in that unit desired to be represented by the Union (R. 14).

An election was held on November 8, 1940, in which 18 employees voted for and 14 voted against the Union (R. 16). On November 18 and 19, after expiration of the 5-day period allowed by the Board's Rules and Regulations for the filing of objections to the election, petitioner filed a request and motion for "reargument" of the Decision and Direction of Election, for setting aside the election, and for reopening of the record (R. 16–17, 102–107). The only matter advanced in this motion which had not already been urged before the Board was that the issues in the instant case were allegedly the same as those in another case then pending before the board, *Matter of Arlington Mills,*[2] and that the Board had taken inconsistent

[2] Known in the records of the Board as 1–R–499 and 1–R–513. The Board's subsequent decision in that case is reported at 31 N. L. R. B. 21.

positions in the two proceedings. On November 28, 1940, petitioner, in further support of its motion, filed an affidavit stating, as an entirely new ground for relief, that certification should be denied the Union because, as alleged on information and belief, some of the employees who had voted "yes" in the election, on the question whether or not they wished to be represented by the Union, had understood that they were voting "for the Company" (R. 108–109). The Board denied the motion and on December 13, 1940, certified the Union as the exclusive bargaining representative of the employees within the unit found appropriate (R. 16–17).

Between December 27, 1940, and January 14, 1941, the Union made repeated efforts to arrange a conference with petitioner's officials; its efforts were unsuccessful, since petitioner either evaded or ignored its written and oral communications (R. 24–25; R. 40, 86–89). On January 14, 1941, having received no reply to a letter of January 8, 1941, requesting petitioner to arrange a conference, the Union filed charges with the Board alleging that petitioner had illegally refused to bargain collectively with it (R. 18, 25; R. 18, 41). On the same day, petitioner wrote to the Union, stating that it could give no reply to the Union's requests for a conference until petitioner had decided on a "definite policy" (R. 25–26; R. 42–43).

The Union's subsequent letters to petitioner were not answered (R. 26; R. 44–46, 64a).

On March 7, 1941, petitioner filed with the Board a motion to set aside its certification and to reopen the representation proceedings (R. 110–118). In support of this motion, petitioner alleged, as "new evidence" affecting the Union's majority status, that it had received two communications, dated November 15, 1941, signed by 20 of the employees in the appropriate unit, stating that they did not wish to join the Union (R. 113–114). Although this motion was filed in March 1941, petitioner averred in its brief in support thereof, that it received these communications "in late November" (R. 26).[3] Petitioner prayed the Board to take further testimony concerning the desires of the employees with reference to representation for collective bargaining purposes and to consolidate the proceeding with the *Arlington Mills* proceeding, referred to above (R. 110). The Board denied this motion on March 12 (R. 7a–8a). Thereupon, the Union again requested petitioner to enter into negotiations with it. Petitioner denied this request on March 21 in a letter in which it invited court review of its actions (R. 26–28; R. 47–49).

On June 2, 1941, the Board issued its complaint against petitioner alleging that it had violated

[3] Petitioner subsequently stated that it received these communications "on or about November 15." (R. 97–98).

Section 8 (1) and (5) of the Act, and a hearing thereon was held from June 16 to June 18 (R. 19, 91–93). In its answer to the complaint, petitioner enlarged upon the original statement in the communications of November 15 that the signers did not want to join the Union; it now alleged that the employees had advised it that they did not want to be represented by the Union (R. 97–98). At the hearing, petitioner went further and offered for the first time to prove that the employees, in addition to communicating with their employer, had notified the Union of their alleged change of heart at a Union meeting held soon after November 15 (R. 72a).[4]

On March 25, 1942, the Board issued its Decision and Order in which it held, on the facts set forth above, that the bargaining unit as found in the representation proceeding was appropriate, that the Union represented a majority of the employees in that unit, and that petitioner had refused to bargain collectively with the Union, in

[4] In its answer in the complaint proceeding, petitioner raised again, by way of separate defenses, various issues which it had raised in the representation proceeding (R. 97–100). On motion of the Board's attorney, the Trial Examiner struck from the answer that portion of these defenses which dealt with the alleged desire of some of the employees in the bargaining unit not to be represented by the Union and the alleged inappropriateness of the bargaining unit found by the Board, on the ground that they involved matters pertinent to the representation proceeding and had been disposed of therein (R. 52a–64a, 70a).

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violation of Section 8 (1) and (5) of the Act (R. 18–35). In reaching this conclusion, the Board treated the evidence offered by petitioner as though it had been received, but held that it was insufficient to overcome the evidentiary force of the "secret Board election." It further held that petitioner's challenge of the certification was "neither timely nor meritorious" (R. 31–32). It accordingly ordered petitioner to cease and desist its unfair labor practices, to bargain collectively with the Union, and to post appropriate notices (R. 34–35).

On August 31, and September 1, 1942, petitions for enforcement (R. 2b–6b) and for review (R. 38b–50b) of the Board's order were filed with the court below by the Board and petitioner, respectively. On October 10, 1942, petitioner filed with the court a motion for leave to adduce additional evidence (R. 11b–16b). The court handed down its opinions on January 18, 1943, enforcing the Board's order with a minor modification not here in issue, and denying petitioner's petition for review and its motion for leave to adduce additional evidence (R. 19b–32b, 55b). The court's decree was entered on February 1, 1943 (R. 33b–35b).

ARGUMENT

1. Petitioner contends that Section 9 (b) of the Act contains an unconstitutional delegation of legislative power in so far as it authorizes the Board to determine the unit appropriate for col-

lective bargaining. The validity of this provision was sustained against the same attack in *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146, 165. It is argued that this decision approved as standards only the phrases "employer unit", "craft unit," and "plant unit," but not the phrase "subdivision thereof." But in the *Pittsburgh Glass* case, the unit involved was a division of the company's operations, consisting of several plants,[5] and thus came within the standards prescribed as a subdivision of the employer unit.

2. The bargaining unit found appropriate by the Board was a "subdivision" of a "plant unit" and, hence, was within one of the categories expressly enumerated in Section 9 (b). The Board's finding was not "arbitrary or capricious," and is therefore binding upon the courts (*Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 113 F. (2d) 698, 701 (C. C. A. 8), aff'd, 313 U. S. 146).

In making its finding, the Board properly took into consideration the fact that unless the unit described in the Union's petition was found to be appropriate, those of petitioner's employees who had already organized would be denied the right to bargain collectively until their fellow employees chose to exercise that right. It thereby followed

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[5] *Matter of Pittsburgh Plate Glass Co.*, 10 N. L. R. B. 1111, 1115–1116.

an established policy,[6] that of considering the "extent of organization" among a company's employees. That policy is applied by the Board, as the statute demands, "to insure to employees the full benefit of their right to self-organization and to collective bargaining" (Section 9 (b), *infra,* p. 18). It is not applied arbitrarily. As we have shown, the employee group here selected was distinct and identifiable (*supra,* pp. 3–4). It was therefore feasible for the employer to bargain collectively with it as a unit.[7] There is no reason to assume, as petitioner suggests (Pet. pp. 12, 16–17), that the Board would divide the plant into several hundred units of 32 employees merely because it has established one such unit in this case. On the contrary, if other departments are organized in the future, the Board would presumably place them together in one unit if it appeared that the establishment of separate units would make collective bargaining difficult or impractical.

Petitioner contends that the Board's decision in the instant case is inconsistent with its subsequent holding in *Matter of Arlington Mills,* 31

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[6] See Board's *Third Annual Report*, pp. 157–158; *Fourth Annual Report*, pp. 83–84; cf. *Fifth Annual Report*, p. 64; *Sixth Annual Report*, p. 63.

[7] In fact, sorters and trappers have special problems of their own, caused by certain technological changes in petitioner's operations; wage problems which have arisen from these changes have been settled without reference to the wages paid in petitioner's other departments (R. 39, 52–68, 23a).

N. L. R. B. 21, 24–25.[8] In that case, however, as the court below noted (R. 25b), one competing union advocated a plant-wide union, and claimed membership of a substantial number of employees—one thousand—throughout the plant.

3. Petitioner urges (pp. 18–22) that it should have been permitted to call the individual employees in the bargaining unit to the stand to testify that they no longer wished to be represented by the Union. The Board was not required, after ascertaining the employees' desires as to representation by holding a secret election, to adopt the unreliable procedure of placing all of the employees on the witness stand to see if they had changed their minds, particularly on the basis of letters written a week after the election (R. 117).

This evidence was first submitted to the Board after the Board had issued its certification. It is contended that the Board erroneously failed to

[8] In only one of the other decisions cited by petitioner at page 11 of the petition was any question raised as to separate treatment of sorters or trappers. That case, *Matter of Colonie Fibre Co., Inc.*, 9 N. L. R. B. 658, did not involve a woolen mill and there is no evidence that the employees there described as "sorters" performed functions similar to the sorters and trappers in the instant case. The "sorters" in the *Colonie* case were not separately organized, and the Board rejected a contention on the part of the employer, unsupported by any considerations warranting separate treatment, that the "sorters" should be excluded from a unit of production and maintenance employees.

consider it and that the court below erred in upholding the Board and in denying petitioner's application for leave to adduce such evidence. We submit that the court's action in denying the application was well within its "sound judicial discretion." *Southport Petroleum Co.* v. *National Labor Relations Board,* 315 U. S. 100, 104.

The Board's holding that petitioner's attempt to challenge the results of the November 8 election was "neither timely nor meritorious" (R. 32) was clearly proper. Petitioner was in a position to call to the Board's attention the evidence which it later offered at least by November 28, since, accepting its allegations as true, it was in possession of the evidence on or about November 15 (R. 97–98) (*supra,* p. 6). Yet on that date, through its attorney, it filed an affidavit in support of its earlier motion to set aside the election which recited other specious grounds for the relief sought, but failed to mention the ground on which it now relies (*supra,* pp. 4–5). In refusing to accept evidence which could have been presented before the representation proceedings terminated in a certification, the Board here merely applied the rules which customarily apply to the reopening of proceedings on the ground of newly discovered evidence. It has full power to do so. Otherwise, the election and certification

machinery of Section 9 of the Act would be deprived of all value.

In any case, the Board considered the evidence offered and properly held it to be insufficient to overcome the clear showing of preference for the Union by a majority of the employees manifested by the result of the election. In rejecting petitioner's attempt to evade collective bargaining with the Union on the basis of an alleged change of heart by the employees, the Board and the court below acted in accord with the decisions of two other circuit courts of appeals holding that the certification procedure would be rendered unworkable if the employer were free to refuse to bargain with a certified union. *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, 478 (C. C. A. 5)[9]; *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. (2d) 760, 764–765 (C. C. A. 7), certiorari denied, 313 U. S. 590. There are no contrary decisions.

In sum, as the court below correctly noted (R. 286):

> * * * The Board has within its authority power to ascertain the will of the majority of a given group of employees by election or other means. The election method is chosen, we take it, because secret ballot is regarded as the most effective way

[9] Contrary to petitioner's assertion (Pet. p. 21), the alleged shift of majority in the *Whittier Mills* case took place, as here, prior to the commission of any unfair labor practice.

> of getting an untrammeled expression of the desire of the electorate. Surely it is not to be defeated of all its effectiveness by a communication, undisclosed to the Board, repudiating, immediately after the election was held, the ballot count. * * *

4. Petitioner avers that it was denied due process of law because the Trial Examiner who presided at the hearing in the representation proceeding was biased and prejudiced or otherwise disqualified because prior to the hearing he investigated the facts on behalf of the Board. The assumption on which petitioner principally relies in this connection (Pet. p. 24), is that the Trial Examiner issued an "intermediate report" to the Board. But no such reports are made to the Board in representation proceedings. National Labor Relations Board Rules and Regulations, Series 2, as amended, Article III, Sections 8 and 9. The Trial Examiner in the representation proceedings herein made no recommendations to the Board, nor did he participate in any way in the formulation of the Board's decision. He acted only as a presiding official at the hearing held for the purpose of accumulating evidence to be submitted to the Board. The court below properly stated (R. 30b):

> The preliminary investigation and the hearing in the representation proceeding are not contentious litigation; not even litigation, but investigation. It is made on behalf of

the Board by members of its staff. The outcome is merely a certification of a bargaining representative.

The fact that a representative of an administrative agency, acting in his official capacity, has participated in an investigation preliminary to a hearing does not establish bias or prejudice on his part, or disqualify him from presiding at a subsequent hearing in the proceeding.[10] This is particularly true when the object of the investigation is merely to determine matters relating to the holding of an election and not whether petitioner had violated the law.

Petitioner's assertions of error on the part of the Examiner, in further support of its contention that he was biased (Pet. pp. 24–25), were properly found to be without substance by the Circuit Court of Appeals; they are adequately treated in the opinion below (R. 29b). Petitioner does not show that it was prejudiced by the rulings complained of. In any case, "the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case." *Berger* v. *United States*, 255 U. S. 22, 31.

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[10] *Brinkley* v. *Hassig et al.*, 83 F. (2d) 351, 356–357 (C. C. A. 10); *Lumber Mutual Casualty Insurance Company* v. *Locke*, 60 F. (2d) 35, 38 (C. C. A. 2); *Reynolds* v. *United States, ex rel. Dean*, 68 F. (2d) 346 (C. C. A. 7), certiorari denied, 291 U. S. 679; *Ex parte Joyce*, 212 Fed. 282 (D. Mass.).

CONCLUSION

The decision of the court below is correct and presents neither a conflict of decisions nor any question of general importance. The petition should therefore be denied.

Respectfully submitted.

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